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In the Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL APPELLEES

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QUESTION PRESENTED

Whether the employee protection provisions of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, impose an unconstitutional taking of property in violation of the Just Compensation Clause of the Fifth Amendment.

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OPINIONS BELOW

The order of the court of appeals (J.S. App. 1a-2a) is not reported. The district court's orders of October 15, 1980 (J.S. App. 3a-6a), and October 16, 1980 (J.S. App. 7a), are not reported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 31a-32a) was entered on December 16, 1980. The notice of appeal (J.S. App. 33a) was filed on December 19, 1980, and the appeal was docketed on January 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974).

STATEMENT

1. In March 1975, after experiencing several years of financial deterioration, the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") petitioned the

United States District Court for the Northern District of Illinois for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. 205. The Rock Island continued to operate for more than four and a half years under the protection of Section 77. After a strike further damaged its financial posture, however, the Rock Island ceased all operations in September 1979.

In January 1980, the reorganization court directed the Trustee of the Rock Island to prepare a plan for its liquidation, and the Trustee began selling the assets of the railroad. On June 2, 1980, the reorganization court authorized the Trustee to abandon the entire Rock Island system and ordered that no employee protection conditions be imposed.

On May 30, 1980, a few days before the reorganization court's abandonment order, the President signed into law the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 ("the Rock Island Act"). Sections 106 and 110 of the Rock Island Act, 94 Stat. 401 and 403 (J.S. App. 35a-41a), required the Trustee, through the use of high priority federal loans, to provide labor protection benefits of up to $75 million to employees of the Rock Island who might be adversely affected by its cessation of operations. Specifically, Section 106(b) of the Rock Island Act, 94 Stat. 401, ordered the Interstate Commerce Commission to impose a fair and equitable labor protection arrangement within 30 days unless, prior to that time, the railroad and labor organizations representing its employees were able to agree upon a satisfactory arrangement. Section 106(c), 94 Stat. 401, provided that the bankruptcy court should immediately direct the Trustee and the labor organizations to implement the arrangement. Section 106(d), 94 Stat. 401, provided that orders of the Commission or of the bankruptcy court under Section 106(b) and (c) could not be stayed and that these orders could be reviewed

only in the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit was required to rule on any such appeal within 60 days, and its decision would not be subject to further review. Section 106(e)(2), 94 Stat. 402, provided that labor protection claims would be treated as administrative expenses of the Rock Island estate.

Section 110 of the Rock Island Act required the Secretary of Transportation to guarantee obligations of the Rock Island for the purpose of providing employee protection under an agreement entered into under Section 106. It further provided that the guaranteed obligations would be treated as an administrative expense of the Rock Island estate and that the United States would incur no liability except in connection with those obligations. The amount guaranteed by the Secretary, and the liability of the Rock Island under a labor protection agreement, were limited to $75 million.

2. After the enactment of the Rock Island Act, the National Mediation Board offered its assistance in negotiating an employee protection agreement. The Rock Island Trustee, however, declined to participate in negotiations. On June 5, 1980, the Trustee, the indenture trustees under the mortgages of the Rock Island and representatives of certain creditor interests filed a complaint in the bankruptcy court seeking a judgment declaring the Rock Island Act unconstitutional and enjoining its enforcement. After a hearing on June 9, 1980, the district court entered a preliminary injunction enjoining the Commission, the Trustee, and the Secretary of Transportation from fulfilling their obligations under Sections 106 and 110 of the Rock Island Act (J.S. App. 13a-14a).

The district court explained its reasons for issuing the injunction in an oral statement from the bench (J.S. App. 15a-22a). Although the court suggested that the statute might have other constitutional problems, it based its

ruling on the fact that the labor protection provisions constituted an unconstitutional taking of the property rights of the creditors, in violation of the Just Compensation Clause of the Fifth Amendment (J.S. App. 17a-19a). The court concluded that if the procedures of the labor protection provisions of the Rock Island Act were permitted to go forward, the creditors of the estate would suffer irreparable harm (*id.* at 19a-20a). Therefore, the court enjoined (i) the Trustee and representatives of affected employees from entering into negotiations respecting a labor protection agreement; (ii) the Commission from considering the imposition of any such agreement; and (iii) the Secretary of Transportation from guaranteeing any loans or obligations of the Rock Island under the Rock Island Act (*id.* at 13a-14a).[1]

Because the district court had interrupted the procedures established by the Act before a labor protection plan could be devised, an expedited appeal to the Seventh Circuit, as contemplated by Congress, could not be taken.[2] Therefore, RLEA, the United States, and the Commission filed notices of appeal to this Court pursuant to 28 U.S.C. 1252.[3] RLEA, supported by the United States and the Commission, sought a stay of the preliminary injunction from Justice

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[1]On June 20, 1980, the court denied a motion for reconsideration filed by the Railway Labor Executives' Association ("RLEA"), the United States and the Commission, again explaining that the labor protection provisions of the Rock Island Act constituted an unconstitutional taking (J.S. App. 26a-27a).

[2]The judicial review provisions of Section 106(d) covered appeals of orders entered under Section 106(b) and (c), which did not come into play until a labor protection plan was devised.

[3]RLEA's jurisdictional statement perfecting this appeal was docketed as No. 80-415. In our response in that appeal, the government urged that the June 9, 1980, injunction be vacated as moot in light of the passage of the Staggers Rail Act.

Stevens in order to allow the procedures mandated by the Rock Island Act to go forward pending a determination of its constitutionality. On June 28, 1980, Justice Stevens denied the application (J.S. App. 43a-47a). Acknowledging that "[n]ecessarily, my views are tentative," Justice Stevens stated that the district court was "probably correct" in finding that the labor protection provisions of the Rock Island Act would constitute a taking of the estate's property (J.S. App. 47a). Justice Stevens rejected the argument that the estate would suffer no irreparable harm if labor protection payments were made and the Rock Island Act were later determined to constitute a taking, because he doubted that the creditors would have a remedy against the government by a suit in the Court of Claims under the Tucker Act, 28 U.S.C. 1491: "[W]hile the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, * * * it is obvious that his suggestion is equivocal" (J.S. App. 47a). The application for a stay was then resubmitted to the full Court, which denied the request on July 2, 1980, by a 5-3 vote.

3. In response to the district court's injunction, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, which was signed into law on October 14, 1980. Section 701 of the Staggers Rail Act, 94 Stat. 1959, amended the Rock Island Act in a number of significant respects.[4] Section 701 re-enacted the provisions of Section 106 requiring the Trustee to negotiate a labor protection agreement. However, the time for the parties to negotiate the agreement was shortened from 10 to five days, and the time for the Commission to impose a fair and equitable arrangement, in the absence of an agreement, was shortened from 30 to 15 days.

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[4]The relevant provisions of the Rock Island Act as amended by the Staggers Rail Act are set forth at J.S. App. 35a-42a.

The judicial review provisions of Section 106(d) were also changed. The amended section no longer includes the prohibition against staying orders of the Commission or the bankruptcy court issued under the Rock Island Act or the bar to further review of the Seventh Circuit's decision. Moreover, the Staggers Rail Act added a new Section 124 to the Rock Island Act (94 Stat. 1998). This Section closed the jurisdictional loophole that had prevented the district court's decision from being appealed expeditiously to the Seventh Circuit, by providing that "[n]otwithstanding any other provision of law, any appeal from * * * any decision of the bankruptcy court with respect to the constitutionality of any provision of [the amended Rock Island] Act * * *" must be taken to the Seventh Circuit, sitting en banc, and must be decided within 60 days.

The Staggers Rail Act also added language clarifying Congress' intention that monies paid out by the estate could be recovered from the United States in the event that the employee protection provisions of the Rock Island Act subsequently were held to be a taking. Section 110(e) of the Rock Island Act was amended to make explicit that the $75 million payment ceiling was a limitation of the liability of the United States to the employees of the railroad, not to the estate. And Section 124(c) was added to the Rock Island Act, providing:

> Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

4. On October 6, 1980, in light of the new statute, RLEA and the United States, supported by the Commission, moved the district court to vacate its injunction of June 9,

1980.[5] The movants argued that passage of the Staggers Act effectively mooted the June 9 injunction because the injunction applied to a statute no longer in existence and had no application to the re-enacted but nevertheless new and distinct obligations concerning labor protection that the Staggers Rail Act imposed on the Commission and the other parties. Moreover, the movants argued that the Staggers Rail Act amendments eliminated the features of the original Rock Island Act that the district court had concluded would lead to irreparable injury unless enjoined—particularly by expressly providing that a Tucker Act remedy is available if the labor protection provisions are ultimately found to effect a taking of property—and therefore that the procedures established in the Staggers Rail Act should be permitted to go forward.

On October 15, 1980, the district court denied the motion to vacate and issued a new injunction preventing the Commission, the Trustee and the Secretary of Transportation from taking any action respecting the labor protection provisions of the "Rock Island Act as amended and re-enacted by the Staggers Rail Act" (J.S. App. 3a-6a). The court held that the "Staggers Rail Act does not cure the defects found in the Rock Island Act" (*id.* at 5a) and that "[t]he Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property" (*id.* at 6a). The Staggers Rail Act did not eliminate the likelihood of irreparable injury to the estate, in the court's view, because (*id.* at 5a):

> The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further,

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[5] Although the Staggers Rail Act did not become law until October 14, 1980, the district court held a hearing on the motion on October 7, 1980, on the expectation that the President would sign the bill.

> the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

The court's order did not discuss the effect of the express provision of a Tucker Act remedy on the irreparable harm question. On October 16, 1980, the court *sua sponte* entered an order (J.S. App. 7a) amending its order of the previous day by changing the phrase "the court orders the issuance of a preliminary injunction," which appears twice, to "the court orders the continuance of the preliminary injunction."

RLEA, the United States and the Interstate Commerce Commission appealed the order granting the preliminary injunction to the Seventh Circuit sitting en banc, pursuant to Section 124(a) of the amended Rock Island Act (J.S. App. 41a-42a). Relying on the Staggers Rail Act, the court of appeals unanimously denied a motion filed by the private appellees to dismiss the appeal for lack of jurisdiction in light of the pending appeal to this Court in No. 80-415 (J.S. App. 2a). On the merits, the court affirmed without opinion by an equally divided vote (*ibid.*).[6] RLEA then docketed this appeal.[7]

DISCUSSION

1. We agree with appellant (J.S. 17-29) that this case presents a substantial federal question. The district court, affirmed by an equally divided court of appeals, has held an Act of Congress unconstitutional with only cursory explanation. The invalidated statutory provisions are central to Congress' efforts to deal with the many problems resulting

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[6]Chief Judge Fairchild and Judges Sprecher and Cudahy voted to reverse. Judges Swygert, Bauer and Wood voted to affirm. Judges Cummings and Pell did not participate.

[7]The federal appellees also filed a notice of appeal, but rather than docket a separate appeal we are simply supporting the jurisdictional statement filed by RLEA.

from the collapse of the Rock Island rail system, and they embody important congressional policies with respect to the protection of adversely affected employees. The importance attached to these provisions by Congress is manifested by the fact that it enacted them on two separate occasions, making several amendments in the Staggers Rail Act specifically responsive to constitutional objections to the original statute voiced by the district court and by Justice Stevens.[8]

The courts below gave virtually no explanation for exercising "the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The district court's first order was supported only by a brief, conclusory statement issued extemporaneously from the bench. The district court's explanation of its second order did not address in any meaningful way the changes made by Congress in the Staggers Rail Act and, indeed, made no reference at all to the explicit provision of a Tucker Act remedy. In view of this failure to explain the decision that these provisions are unconstitutional, a difficult question on which the court of appeals was equally divided, plenary review by this Court is plainly warranted.

2. On the merits, we submit that the district court erred in concluding that the amended Rock Island Act effects an unconstitutional taking of property. As this Court has recognized on many occasions, there is no "set formula" for determining whether a governmental obligation effects a "taking" of private property or, alternatively, imposes a permissible regulatory burden. See, *e.g.*, *Penn Central*

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[8]Congress explicitly stated that it was amending the Rock Island Act in order to allow the processes of the Act to go forward immediately by curing the problems that had prevented this Court from staying the June 9, 1980, injunction. H.R. Conf. Rep. No. 96-1430, 9th Cong., 2d Sess. 137 (1980).

Transportation Co. v. *New York City*, 438 U.S. 104, 123-124 (1978). In the specific instance of the imposition of protection for railroad employees, however, the Commission has long had a policy of conditioning its approval of, *inter alia*, abandonment applications—a statutory prerequisite to a railroad's cessation of operations—on the requirement that the abandoning railroad provide certain protections to employees who will be adversely affected by the abandonment. In 1976 and 1979, Congress itself specifically provided for the imposition of labor protection as a condition of railroad abandonments. See Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. (Supp. III) 10903(b)(2) and 11347; Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 904(a) and 915(c).

This Court has consistently approved the Commission's imposition of labor protection as a permissible regulatory burden on interstate railroads, rejecting constitutional challenges to this policy. In *United States* v. *Lowden*, 308 U.S. 225, 234-240 (1939), the Court held, in the context of a railroad consolidation, that mitigation of harm to employees is in the public interest and protects the orderly and efficient operation of the national railroad system. Rejecting the contention that the requirement of labor protection is a taking in violation of the Fifth Amendment, the Court stated (308 U.S. at 240):

> Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege. * * * Moreover we cannot say

> that this limited and special application of the principle, fully recognized in our cases sustaining workmen's compensation acts, that a business may be required to carry the burden of employee wastage incident to its operation, infringes due process.

And this Court has established that this authority to impose labor protection exists in connection with a railroad abandonment just as with a consolidation. *ICC* v. *Railway Labor Executives' Ass'n*, 315 U.S. 373, 377 (1942).

In light of this longstanding policy, it is clear that the Rock Island Act does not impose a new, unforeseeable obligation on the estate of the Rock Island. Investors in the railroad industry are aware from the start that their right to abandon railroad operations is circumscribed by the need to consider the public interest, which includes labor protection. The Rock Island Act merely reaffirmed the railroad's existing obligation, while providing a means for funding that obligation and *limiting* it to $75 million.[9] The passage of the Act did not transform into a "taking" of private property this longstanding obligation that has always been viewed as permissible regulation.

Nor does the fact that the district court ruled, in January 1980 and again in July 1980, that the Rock Island was not reorganizable on an income basis and had a right to cease operations and liquidate (see *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920)) support the view that the Rock Island Act effected a taking. If an obligation imposed on an enterprise is properly viewed as a regulation (for example, an obligation to pay for the cleanup of oil spills), it is not converted into a "taking" merely because the

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[9]Under 49 U.S.C. (Supp. III) 11347, the minimum amount of labor protection permitted is full protection against adverse effects for the lesser of six years or the period of the individual's employment. See *New York Dock Ry.* v. *United States*, 609 F. 2d 83 (2d Cir. 1979).

enterprise becomes insolvent. Moreover, as Congress explained when it enacted the Staggers Rail Act, if the obligation to provide labor protection automatically evaporates when a liquidation is authorized, the consequence will be "to promote liquidations, to the detriment of the employees and the public interest." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138-139 (1980). In sum, the Rock Island Act merely reaffirmed and limited a preexisting and potentially larger obligation of the estate, and that obligation is not converted into a taking by the unreorganizability of the estate.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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